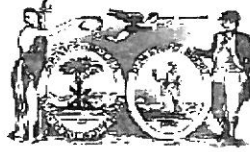


STATE OF SOUTH CAROLINA
State Budget and Control Board
PROCUREMENT SERVICES DIVISION

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GOVERNOR

CONVERSE A. CHELMS III, CPA
STATE TREASURER

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FRANK W. FUSCO
EXECUTIVE DIRECTOR

DELBERT H. SINGLETON, JR.
DIVISION DIRECTOR
(803) 734-2320

MATERIALS MANAGEMENT OFFICE
1201 MAIN STREET, SUITE 600
COLUMBIA, SOUTH CAROLINA 29201
(803) 737-0600
Fax (803) 737-0639

R. VOIGHT SHEALY
MATERIALS MANAGEMENT OFFICER

April 10, 2009

Steve Hilton, President
Hilton Displays
125 Hillside Drive
Greenville, SC 29607

Re: **DECISION**
IN THE MATTER OF: Protest
Signage at Clemson University International Center for Automotive Research
SOLICITATION #6817 CU-ICAR Outdoor Signage
CASE NUMBER: 2009-109

Dear Mr. Hilton:

Please find enclosed the Decision of the Chief Procurement Officer concerning the administrative review held on March 31, 2009, relative to the referenced matter.

If I can be of assistance to you in this matter, please let me know. Also, please note that a copy of this Decision has been posted today on the sixth floor of the Materials Management Office, 1201 Main Street, Columbia, South Carolina.

Respectfully,

A handwritten signature in cursive script, reading "Voight Shealy".

R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

enclosure

cc: Keith McCook, Assistant General Counsel
Frank Potts, Assistant General Counsel
Mike Nebesky, Procurement Director, Clemson University
Scott Pigeon, Procurement Manager, Clemson University
Karen Hardy, Angles Wood and Graphics

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	DECISION
In the Matter of Protest of:)	
)	CASE NO. 2009-109
Hilton Displays)	
)	
Clemson University)	POSTING DATE:
BVB No. 6817 CU-ICAR)	
<u>Outdoor Signage</u>)	APRIL 10, 2009

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Hilton Displays (Hilton). With this solicitation, Clemson University (Clemson) attempts to procure outdoor signage for the new International Center for Automotive Research (ICAR) campus. Clemson processed the procurement as a best value bid (BVB) with the bids being evaluated based upon three criteria: Price (60%), Minority business participation (20%), and Past performance & expertise in similar work (20%).

In the letter, Hilton protested Clemson's intent to award to Angles Wood & Graphics (Angles) alleging: 1) Angles is not "properly licensed in the State of South Carolina and the City of Greenville," SC" 2) "Hilton Displays (not Angles) offered the Best Value Bid," 3) "Hilton Displays is an in-state contractor which should have Resident Vendor Preference," and 4) "Affirmative Action provides for the award of government contracts when the Minority Business Enterprise submits a responsive and materially competitive bid. It does not provide for unfair pricing advantages."

In order to resolve the matter, the CPO conducted a hearing March 31, 2009. Appearing were Hilton, represented by Steve Hilton; Angles, represented by Kathy Pickel, owner and Chief Executive Officer; and Clemson, represented by Mike Nebesky, Director of Procurement Services.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On December 8, 2008, Clemson issued the BVB. [Ex. 1]
2. On December 12, 2008, Clemson issued Amendment No. 1. [Ex. 2]
3. On December 16, 2008, Clemson issued Amendment No. 2. [Ex. 3]
4. On December 19, 2008, Clemson issued Amendment No. 3. [Ex. 4]
5. On December 30, 2008, Clemson issued Amendment No. 4. [Ex. 5]
6. On January 12, 2009, Clemson opened the BVBs. Based on price alone, the lower bids were 1) Garfield - \$91,163.27, 2) Hilton Displays - \$111,108.00, and 3) Angles - \$132,599.75.
7. On February 18, 2009, after evaluating the bids against the three evaluation criteria, Clemson posted an intent to award to Angles. [Ex. 7, p.2]
8. On February 23, 2009, Hilton filed its protest with the CPO.

DISCUSSION OF COMPETITIVE BEST VALUE BIDDING

The Consolidated Procurement Code (Code) authorizes the use of competitive best value bidding “[w]hen a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State.” (SC Code Ann. § 11-35-1528(1).) The Code reads further, “[t]he purpose of best value bidding is to allow factors other than price to be considered in the determination of award for specific goods and services based on pre-determined criteria identified by the State” in the BVB. (SC Code Ann. § 11-35-1528(2).) The Code lists various evaluation factors that may be used and reads, “Cost must be a factor in determination of award and cannot be weighted less than sixty percent.” (SC Code Ann. § 11-35-1528(5).)

CONCLUSIONS OF LAW

In the first issue, regarding Angles meeting licensure requirements, Hilton alleged that Angles is not licensed by the City of Greenville or the State of South Carolina, that Angles is not registered with the

Secretary of State to conduct business in the state, and Angles is not registered with the Governor's Office of Small and Minority Business Assistance. The BVB read, "Successful Offeror must be properly licensed in the State of South Carolina and the City of Greenville, SC to perform the scope of work described" [Ex. 1, p. 4, Contract Execution] Hilton argued Clemson required Angles to be licensed and registered with those respective offices before it submitted its bid, but did not enforce that requirement.

Clemson did require the successful offeror to be properly licensed in the State of South Carolina and the City of Greenville. Regardless, the statutes and ordinances that we operate under require that contractors comply with state and local licensure and registration requirements. Such requirements are matters of bidder responsibility, not responsiveness. The Code requires that a bidder be determined responsible prior to award, effectively prior to performance, not at the time of submitting a bid. The Code defines a responsible bidder as "a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance." [11-35-1410(7)] [Emphasis added] The supporting regulations read in part that a responsible bidder must have "available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them." [19-445.2125(A.)]

Ms. Pickel acknowledged that Angles was not licensed to conduct business in the City of Greenville at the time it submitted the bid, but she delivered to the CPO a City of Greenville Business License #004649, issued to Angles on March 6, 2009, at the hearing. Ms. Pickel stated that Angles is not registered with the Secretary of State as a foreign corporation conducting business in the state, but she is in the process of registering her company. By consensus opinion, all parties agreed that the State of South Carolina does not require a contractor's license to install signs so contractor licensing by the State of South Carolina is not required. Regarding certification with the Governor's Office as a minority business enterprise, certification by the Governor's Office is not required to conduct business with the State.

In the second issue, Hilton alleged “Hilton offered the Best Value Bid.” As noted previously, the Code allows best value bidding “to allow factors other than price to be considered in the determination of award.” [11-35-1528] Hilton asserts that it offered the best value based on the fact that it offered a lower bid than Angles. However, Clemson stated clearly in the BVB that the evaluation criteria were: 60% - installed cost, 20% - Minority business participation, and 20% - Past performance & expertise in similar Work. [Ex. 1, p.4, Evaluation Criteria] Regarding award of a best value bid, the Code requires, “Award must be made to the responsive and responsible bidder whose bid is determined, in writing, to be most advantageous to the State, taking into consideration all evaluation factors set forth in the best value bid.” [11-35-1528(8)] For this issue, the relevant question is whether Clemson evaluated the bids as announced in the BVB.

Clemson evaluated the bids as stated in the BVB with the scoring results for the first five highest ranked bidders were as follows:

<u>Bidder</u>	<u>Total Score</u>
Angles	80.25
Garfield	80.00
The Fitts Co.	71.18
Burton Signworks	63.98
Hilton	58.23

Hilton presented no evidence that Clemson did not evaluate the bids in accordance with its published evaluation criteria.

In the third issue, Hilton alleged, “Hilton Displays is an in-state contractor which should have Resident Vendor Preference.” Hilton refers to the Code’s stated preference for vendors resident to the State of South Carolina, which reads, “A preference of seven percent must be provided to vendors who are residents of South Carolina or whose products are made, manufactured, or grown in South Carolina as set forth in this section.” [11-35-1524(A)] According to Clemson’s bid comparison worksheet, Hilton requested the South Carolina Resident Vendor Preference; Angles, which is from Snellville, GA, could not. Before evaluation of the prices offered by the bidders, Clemson adjusted the raw bids in accordance with this

requirement of the Code. Clemson added seven percent (7%) to Angles' bid of \$123,925.00 inflating it for comparison purposes to \$132,599.75. As a resident vendor, Hilton's bid price was not inflated.

In the fourth issue, Hilton alleged:

Hilton Displays is using minority contractors to complete a portion of the work . . . Awarding a contract, to an out-of-state vendor and paying an additional \$12,717.00 is not in the best interest of the South Carolina tax payers and it goes beyond the rationale or reasonable interpretation of Affirmative Action. Minority Owned Businesses are not exempt from providing competitive prices or engaging in fair trade practices. The intention of Affirmative Action does not embrace pork-barrel spending and the exorbitant waste of tax revenues. Affirmative action provides for the award of government contracts when the Minority Business Enterprise submits a responsive and materially competitive bid. It does not provide for unfair pricing advantages.

Regarding minority vendors, the Code provides a program of assistance to minority vendors. The Code reads, "The [Budget and Control] board shall promulgate regulations that designate such procurement contracts as it may deem appropriate for negotiation with certified, South Carolina-based minority firms."

[11-35-5230]

The Code requires the Chief Procurement Officers to assist minority businesses with the procurement procedures developed pursuant to this code, to cooperate with other appropriate private and state agencies in issuing supplementary instructions designed to assist minority businesses with the state procurement procedures, to maintain special source lists of minority business firms detailing the products and services which they provide, to include and identify minority business on the state's bidders' list and ensure that these firms are solicited on an equal basis within nonminority firms, and to work with appropriate state offices and minority groups in conducting seminars to assist minority business owners in learning how to do business with the State. [11-35-5220]

The Code requires state agencies to develop annually a Minority Business Enterprise (MBE) Utilization Plan, to state a policy, to name an MBE coordinator, to set goals that include expending with Minority Business Enterprises certified by the Office of Small and Minority Business Assistance an amount

equal to ten percent of each governmental body's total dollar amount of funds expended, to solicit certified minority vendors, (a list which is supplied by the Governor's Office), and to develop procedures to be used to divide total project requirements into smaller tasks which will permit increased MBE participation. [11-35-5240]

The Code provides for the creation of a Small and Minority Business Assistance Office (SMBAO) to work with the (Budget and Control) board and the Department of Revenue in carrying out the intent of this article. Relevant here, the Code establishes that the responsibilities of the office include to, "Receive and process applications to be registered as a minority firm in accordance with Section 11-35-5230(B). [11-35-5270(5)] The Code creates a certification program, which requires, "Any firm desiring to be certified as a minority firm shall make application to the Small and Minority Business Assistance Office (SMBAO) as defined by Section 11-35-5270." [11-35-5230(3)]

According to the supporting regulations, "In order for a firm to be certified, the business must have an office in South Carolina, duly registered and licensed as a South Carolina business, it must be found to be a small independent business owned and controlled by a person or persons who are socially and economically disadvantaged. [19-445.2160(D)] [Emphasis added] Angles is neither a South Carolina business nor is it certified by the SMBAO. In fact, absent a South Carolina office, Angles is ineligible for SMBAO certification.

Clemson ignored the Code's requirements that only firms with offices in South Carolina are eligible for certification and that certification must be made by the governor's Office.

DETERMINATION

Issue #1 regarded licensure to conduct business in South Carolina. At the time Angles submitted its bid, it was not licensed to do business in the City of Greenville, it was not registered as a foreign corporation doing business in the state with the Secretary of State, and was not registered or certified by the SMBAO as a

certified South Carolina minority business. However, the Code requires a determination of responsibility prior to award, not at the time of bidding. Generally, licensure requirements must be met prior to a notice to proceed with the work, not prior to bidding. Performance has not started in this case. Therefore, a determination of Angles' licensure and registration with the State of South Carolina is not yet due.

Issue # 2 related to the evaluation of bids with Hilton alleging, effectively, that Clemson should have awarded Hilton the contract because Hilton offered a lower price than Angles. However, the BVB stated clearly that price was not the only consideration for award. Other evaluation factors included minority business participation and past performance and expertise in similar work. After evaluation, Hilton's bid was ranked fifth. Based merely on bid price, Hilton would not have won either, as Garfield submitted a bid \$19,944.73 lower than Hilton. While argument was made regarding the result of the evaluation, no compelling evidence was received to show that Clemson did not evaluate the bids as stated in the BVB.

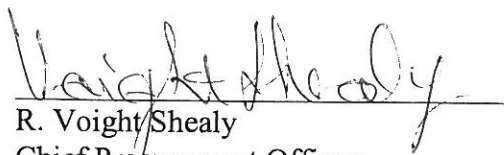
In Issue # 3, Hilton alleged, "Hilton Displays is an in-state contractor which should have Resident Vendor Preference." However, according to all evidence received, Hilton gained the full seven percent (7%) advantage accorded South Carolina resident vendors by the Code.


In Issue # 4, Hilton challenged Clemson's consideration of the use of minority contractors, in particular minority contractors not resident to South Carolina, in determining the award. Clemson set aside 20 points of 100 total evaluation points for "minority business participation." Those points determined the award in this case. Clemson argued that its program was not based upon a set aside or preference, but rather merely considered minority status as an award criterion. While supportive of Clemson's philosophy of encouraging and including minority bidders, based upon recent decisions by the U.S. Supreme Court, the CPO cautions Clemson in its use of unauthorized preferences.

Clemson created its own diversity policy outside that authorized under the Code without legislative authority. Clemson recognized minority business enterprises from outside South Carolina in conflict with

the Code. Such recognition of non-south Carolina minority business enterprises outside South Carolina granted an unauthorized preference. Clemson accepted certifications of minority business enterprises by authorities other than the SMBAO in conflict with the Code. Clemson argued that, due to its remote location in the State, few minority business enterprises certified by the SMBAO exist within its service area. While that may be true, the General Assembly has provided that the "board shall promulgate regulations that designate such procurement contracts as it may deem appropriate for negotiation with certified, South Carolina based minority firms. . . ." SC Code Ann. § 11-35-5230(A). No authority has been given to the Budget & Control Board or Clemson to enlarge the scope of the statute and the chief procurement officers (and all other State employees) are required to implement the policy in accordance with the statute as described by the Legislature. SC Code Ann. § 11-35-5210(2).

This was a solicitation using competitive best value bidding pursuant to the SC Code Ann. § 11-35-1528. The statute requires that the best value bid "must state the factors to be used in determination of award and the numerical weighting for each factor." SC Code Ann. § 11-35-1528(5). Since the evaluation factor and resulting points related to minority participation cannot be utilized, an award cannot be made based upon all the evaluation factors set forth in the solicitation. Thus, the award cannot be sustained and the contract for the signage must be re-bid.


R. Voight/Shealy
Chief Procurement Officer
for Supplies and Services


Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

HILTON DISPLAYS

GREAT SIGNS FOR GREAT COMPANIES

February 23, 2009

Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201
Attention: Mr. Voight Shealy

Subject: Official Letter of Protest

Reference: Solicitation #6817 CU-ICAR Outdoor Signage

Dear Mr. Shealy:

Hilton Displays, Inc. participated in a recent solicitation #6817 for the ICAR Signage with the procurement department at Clemson University.

We wish to file an appeal to the awarding of the contract to Angles Wood and Graphics, based on the following:

First, the Instructions to Offerors, in the Solicitation Outline under item "C" says that the successful offeror must be properly licensed in the State of South Carolina and the City of Greenville, SC. Upon review with the City of Greenville on February 23, 2009 the City says no such out of state company holds a business license with the City of Greenville. Further, the South Carolina Secretary of State has no record of this entity. Angles Wood and Graphics was not a qualified bidder as outlined in the terms of the Offer.

Second, on page two of the Invitation to Bid, Award Criteria section, the bid box checked is Best Value Bid. The bid awarded to Angles Wood and Graphics was for the amount of \$123,825.00, the bid submitted by Hilton Displays, Inc. was in the amount of \$111,108.00; a difference of \$12,717.00. Hilton Displays offered the Best Value Bid.

Third, Hilton Displays is an in-state contractor which should have Resident Vendor Preference. Hilton Displays is using minority contractors to complete a portion of the work as described in the offering.

Awarding a contract, to an out-of-state vendor and paying an additional \$12,717.00 is not in the best interest of South Carolina tax payers and it goes beyond the rationale or reasonable interpretation of Affirmative Action. Minority Owned Businesses are not exempt from providing competitive prices or engaging in fair trade practices. The intention of Affirmative Action does not embrace pork-barrel spending and the exorbitant waste of tax revenues. Affirmative Action provides for the award of government contracts when the Minority Business Enterprise submits a responsive and materially competitive bid. It does not provide for unfair pricing advantages.

If additional detail is necessary for your evaluation of this protest, please do not hesitate to contact me at your earliest convenience.

Very Truly Yours,
Hilton Displays, Incorporated



Steve Hilton
President